ADEQ Responses to Comments Received on the AZPDES General Permit for Concentrated Animal Feeding Operations AZG2004-002

This response was prepared April 7, 2004 to address comments on the draft permit that was noticed in the Arizona Administrative Record on February 13, 2004. The public comment period ended upon close of business March 15, 2004. The comments received, and ADEQ responses, are summarized as follows:

General Comments

Comment: The CAFO proposal will have a profound impact on livestock production in this state. Yet, no notification was ever directly afforded producers. Typically, rules are made and comment periods designated with no actual notice to affected parties and the assertion then made that due process was afforded.

Response: In addition to following the requirements in Arizona Administrative Code R18-9-A907 for general permits, the Department provided draft documents and proposed documents to the producer organizations and also to any known CAFOs that are independent in December 2003 and also in February 2004. Before the general permit efforts, the Department also worked with that same set of stakeholders on the development of the rules that govern CAFOs in Arizona.

Comment: ADEQ's website states that animal waste "can run off farms and pollute nearby waterbodies." (Emphasis added.) The website further asserts that agriculture runoff has been "linked" to microorganisms which are "believed to be responsible for major fish kills. In several mid-Atlantic states. (Emphasis added.) In short, in the absence of any solid scientific evidence, ADEQ and the State of Arizona are rushing off to impose costly burdens on its livestock producers on the mere belief of what may have happened to fish a continent away. We live in a desert. Waterbodies are few and far between; yet, we are prepared to adopt costly regulations designed for states with abundant rainfall. The regulation talks of 25-year, 24-hour rainfall events. I am 53 years old, a third generation native Arizonan, and have never witnessed a 24-hour rainfall event in this state.

Response: The Department understands that a fish kill is one type of impact from the pollution from a concentrated animal feeding operation. There are many more types of problems that are experienced when the wastes from a CAFO are mismanaged and/or the pollutants have access to surface waters including dry washes. No matter the amount of rainfall, the infrequent storm events, that are sometime severe in Arizona, have the potential to impact the environment if the stormwater run-off contains CAFO wastes. When the Environmental Protection Agency (EPA) developed the regulations in February 2003, the EPA developed regulations had the least economic impact on the industry while still being protective of the environment and human health. The Department, as an approved permitting authority, must apply the federal regulations on the state level.

In addition, the Department would like to clarify that a “25-year, 24-hour rainfall event” is a precipitation event with a probability recurrence interval of once in 25-years as defined by the National Weather Service in Technical Paper No. 40, “Rainfall Frequency Atlas of the United States,” May 1961, or equivalent regional or State rainfall probability information developed from this source. It is based on actual amounts of rainfall within a 24-hour period. The rainfall event does not have to last for 24 consecutive hours. The CAFOs must be able contain the amount of precipitation from that “25-year, 24-hour rainfall event” based on rainfall data at the closest

National Weather Service monitoring spot to the location of the CAFO.

Comment: CAFOs are defined based on animal numbers. No consideration is given as to space or time. Do 300 head of weaner calves grazing stubble on 400 acres of irrigated pivots for two months constitute a CAFO? What about 300 head of calves in a corral facility for 30 days for weaning? What about 500 head of cows and calves in a corral overnight? Do 300 head of heifers brought into a half-section trap for calving constitute a CAFO?

Response: The scenarios the commenter listed do not automatically meet the definition of a CAFO. For smaller operations, as in the examples stated, the Department must evaluate other factors before applying the regulatory program to that smaller operation. Although the rules do not specifically include provisions based on space or time, it does include, for smaller operations (those that do not meet the definition of Large CAFO), the potential for discharging CAFO wastes off site. This potential is impacted by the amount of space available to the CAFO. The operations described by the commenter may be subject to the program, if there is the potential for the CAFO wastes to be discharged to any surface water. The Department would need to review the specifics of the operations before making a determination.

AZPDES Draft Permit

Comment: Cover Page. Eliminate comprehensive from second paragraph, third line. This will eliminate confusion between a CNMP versus an NMP.

Response: To avoid confusion, the Department revised the language on the cover page to read: "a nutrient management plan (NMP) that is comprehensive in accordance with Parts II and IV.A. of this general permit…."

Comment: Part I.B.: Second paragraph should explain how AFOs with separate owners sharing fields and/or waste-storage structures or conduits will be affected in more detail. This clarification is especially important in AZ since many families have multiple AFOs between them and try to move the waste in order to avoid NMP development. As written, the paragraph states that two or more operations using a common waste disposal system will be considered a single AFO; in this example, which operation needs an NMP?

Response: The "common ownership" criterion comes directly from the definition of CAFO included in the federal regulations at 40 CFR 122.23(b)(2) and addressed in A.A.C. R18-9-D901(A). The Department does not have the specific authority to include the operation as the commenter described, unless the conditions at A.A.C. R18-9-D901(B) are met and the Department designates the animal feeding operation as a CAFO. No change made to the permit.

Comment: Table 1: Eliminate "cow and calf pairs" and list calves. Why are "veal calves" in a separate section? What defines a veal calf?

Response: The categories listed in Table 1 follow the language within the EPA definition of "Large CAFO" at 40 CFR 122.23(b)(4) and "Medium CAFO" at 40 CFR 122.23(b)(6). EPA specifically included the term "cow/calf pairs" because the regulations count the pair as one animal. The Department uses "cow and calf pairs" which has the same intent. The term "veal calves" is listed in a separate section because it follows 40 CFR 122.23(b)(4)(ii) and (iii). Also, EPA did not apply the effluent guidelines for cattle to veal calves. Rather EPA developed a separate category of effluent guidelines that applies to Swine, Poultry and Veal Calves. EPA describes it reasoning for handling veal calves differently at 68 FR 7208 – 7209, February 12, 2003. No change to the permit language.

Comment: Table 2. The various due dates are confusing. What is the difference between the first two entries?

Response: The various scenarios for deadlines are necessary to address the lag in implementation between the federal regulations and the state regulations and the differences between the old federal regulations and the updated federal regulations for CAFOs. The first entry "An animal feeding operation defined as a CAFO before February 2, 2004" covers AFOs that met the definition of CAFO as it was defined in the old federal regulations (effective before April 14, 2003). Operations subject to the old CAFO regulations had the number of animals for a CAFO but did not have adequate storage capacity for the CAFO's manure and process wastewater along with the stormwater from precipitation events that were under the 25-year, 24-hour storm. Operations that met the old definition were required to have permit coverage. The definition of CAFO changed slightly in the current rules and regulations covering CAFOs. The number of animals within the categories in the definitions has changed slightly. Also, capacity isn't a factor for determining applicability any longer – all CAFOs must apply for permit coverage. The "newly defined" CAFOs – those operations that were not CAFOs under the old rules but are now CAFOs under the current rules, have until February 13, 2006 to apply for permit coverage. The February 13, 2006 compliance date comes from the federal regulations that became effective on April 14, 2003. No change made to the permit, however clarification was added in Part V of the Fact Sheet, after Table 2.

Comment: Table 2 lists that the Notice of Intent (NOI) requirements for a new CAFO constructed between April 14, 2003 and September 30, 2004 are due by March 3, 2004. This due date precedes the final date of submission for these comments and several months before the September 30, 2004 date. How would a potential permittee who decides to construct a new CAFO in June of 2004 file the NOI by March 3, 2004? This seems to be a misprint.

Response: The Department must include application due dates in the permit that comply with the application due date requirements specified in A.A.C. R18-9-D904(A). For all new CAFOs, the due date is 180 days before the CAFO begins operation. For operations that start construction after April 14, 2003 and commence operations within 180 days of general permit issuance, the due date for applying for permit coverage is before the effective date of the general permit. Although this is a quandary in light of the status of the CAFO general permit, the requirement to apply for permit coverage is a requirement whether or not the Department has made a general permit available to the regulated community. If no general permit is available, then the regulated entity should apply for an individual permit. In reality, however, the Department would like to regulate these operations through a general permit.

Because the Department was not able to issue the CAFO general permit before March 3, 2004 and new CAFOs are required to submit an application at least 180 days before the CAFO begins operation, the Department will modify Table 2 to include one scenario for new CAFOs. For the new CAFOs that should have submitted a permit application before the effective date of the permit, the Department urges the owners or operators of new CAFOs to submit an NOI as soon as possible after the permit is issued. The Department will use enforcement discretion in these cases. The Department will revise Table 2 of the permit and fact sheet to include only the following scenario for new CAFOs:

Operation Description	Commencement Date	Due Date
~~A new CAFO~~	~~Construction started between April 14, 2003 and September 30, 2004~~	~~by March 3, 2004~~

A new CAFO	Construction started ~~on or after September 30, 2004~~ after April 14, 2003	at least 180 days before the CAFO begins operation

Comment: Part III.B.2.: This paragraph addresses "each field." Is there a definition for field? Does each individual field need to be treated as such, or can fields on the same soils, under the same management techniques, with the same crop rotation be grouped? This is a concern because it will increase the sampling requirements, therefore greatly increasing cost and NMP development time.

Response: Neither the Department nor EPA provided a definition of field in rule or regulation, respectively. In general, "field" is the land area upon which CAFO wastes are land applied. The Department intends to allow the owner or operator to manage fields with similar soils in a similar manner. The Natural Resources Conservation Service (NRCS) Nutrient Management Standard (Code 590) (April 2002) also addresses this issue stating: "Fields having similar soil test results and crop recommendations may be grouped." (page 2 of 8) Permittees may find the NRCS soil survey maps helpful in determining the soils types. No change made to the permit, however clarification was provided in Part VI.B. of the Fact Sheet.

Comment: Part III.B.2.a.: The last sentence refers to Code 590 dated April, 2002. We feel since Code 590 is currently being updated, the date should reflect the new published date and/or should use the set date and include "or most recent publication" or a statement to that affect.

Response: Similar to Arizona rulemaking, it is appropriate to specify the April 2002 NRCS document because it is readily available and stakeholders have certainty in the requirements for compliance purposes. A general requirement to comply with the most recent publication does not provide permittees adequate notice of the requirements. The NRCS Nutrient Management Standard (Code 590) has not been updated yet, so ADEQ cannot refer to a document that is not final yet. Once the NRCS Nutrient Management Standard (Code 590) is updated, depending on the remaining length of the permit term, then ADEQ may modify the permit to account for the newer document. No change made to the permit.

Comment: Part III.B.2.a.: Change the term "Nutrient Management Code 590" to" Nutrient Management Standard (Code 590)".

Comment: Part III.B.3.; Part IV.B.7; Part VI.A.2.f.: replace "Code 590" with "NRCS Nutrient Management Standard (Code 590)".

Response: The Department made the appropriate changes throughout the permit and Fact Sheet.

Comment: Part III.B.2.b.: Are these testing constituents federally mandated? The listed items are all variable and may not be reliable. We suggest these constituents be reviewed to verify their applicability. Also within this section, it states that soil only needs to be tested for phosphorus; is this correct? Why are the soil and waste nutrient testing requirements different, not only in type, but in frequency? Also, specify protocol or reference for sample collection and analytical methods for clarification and consistency. Consider referring to NRCS for more answers or support.

Response: 40 CFR 412.4(c)(3), that is incorporated by reference at A.A.C. R18-9-A905(A)(9), states: "Manure and soil sampling. Manure must be analyzed a minimum of once annually for nitrogen and phosphorus content, and soil analyzed a minimum of once every five years for phosphorus content. The results of these analyses are to be used in determining applications rates for manure, litter, and other process wastewater." Part III.B.2.b. of the permit

requires that manure is analyzed at least annually for total nitrogen, TKN, ammonia, nitrate-nitrogen and total phosphorus. The analytical results on for the nitrogen-based constituents will provide data so that the parties may calculate a mass balance (budget) for nitrogen. Phosphorus binds to the soil better than nitrogen, so that is why the permittee is only required to sample the soil for the phosphorus content.

The permittee shall use sampling protocols and test procedures that comply with Part VIII.J.4. of the permit which states that if a method is not specified within a permit or in 40 CFR 136, that the permittee shall follow the protocols specified in NRCS Nutrient Management Standard (Code 590).

In addition, the permit includes the following definition: "'Manure' means any waste or material mixed with waste from an animal including manure, bedding, compost and raw materials, or other materials commingled with manure or set aside for disposal." Process wastewater is included in "other materials commingled with manure or set aside for disposal." The permittee should analyze the solid and the liquid portions of the "manure." No change made to the permit, however clarification is added at the end of Part VII.B. of the Fact Sheet.

Comment: Part III.B.2.c.: Please define "Period." If left as is, the definition may be left to the operator's discretion.

Response: This language is from 40 CFR 412.4(c)(4). The Department interprets "periodically" to mean "weekly" or "daily" depending on the situation. In some cases, monthly inspections may be appropriate. This is one area that is left to the discretion of the permittee.

Comment: Part III.B.2.d.: What about wells and pivots within a field? What about tailwater collection; do these ditches qualify as conduits? Does this section require a 100-foot setback from each of these examples? If so, it is an unrealistic demand considering irrigation methods in Arizona.

Response: At 68 FR 7209, February 12, 2003, the EPA states that CAFOs must "Maintain a setback within 100 feet of any down-gradient surface waters, open tile intake structures, sinkholes, **agricultural well heads**, or other conduits to surface waters…" (bolding added.) The 100 feet setback applies to wells and pivots within a field. In regards to tailwater ditches/collection, if a CAFO is land applying wastes, the owner or operator is prohibited from using any collection device that discharges into a conveyance with direct connection to a water of the U.S. Most tailwater collection is for irrigation district reuse. In this case, this would be a CAFO discharge and should be treated as such, therefore the 100 feet setback applies. No change made to the permit.

Comment: Part III.C.2 through Part III.C.4.: Multiple and frequent inspections are unrealistic.

Response: The Department disagrees. The owner or operator should inspect the process wastewater facilities at least on a weekly basis to ensure that the components are operating properly, especially that there are no leaks. These frequencies are specified in 40 CFR 412.37 and 40 CFR 412.47. No change made to the permit.

Comment: Part III.C.3.: Permittee must perform daily visual inspections of all water lines, including drinking water or cooling water lines when present. In most cases these types of lines will be underground and it is impossible to perform a "visual" inspection. The rule should be clarified to require that above ground water lines are maintained or repaired to reduce any leakage to surface areas where animals are produced.

Response: The Department added language at the end of Part VI.C. of the Fact Sheet to explain that the Department expects the permittee to visually inspect water lines that are visible

(any that are not buried in concrete or soil or encased) each day. The requirement does not require the permittee to uncover buried water lines or to remove the casing to inspect the water lines. However, the Department expects permittees to investigate water lines for potential leaks if there is evidence of leaks, such as moisture in the soils above the water lines outside of rainfall events.

Comment: Part III.C.5.: May be impossible to correct deficiencies within 15 days; consider increasing.

Response: The Department understands that the owner or operator may not be able to correct some deficiencies within 15 days, hence the wording "Correct any deficiencies that are identified in daily and weekly inspections within 15 days or as soon as possible." No change made to the permit.

Comment: Part IV.A.: Considering Arizona's current situation, requiring a certified nutrient management planner to prepare and approve NMPs in Arizona will result in an NMP deficit for most of Arizona's CAFOs. Either this should not be a requirement, more certified planners must be trained and made available as soon as possible, and/or ADEQ should use their enforcement authority to be flexible with operations waiting for NMP development.

Response: EPA indicated in the preamble (68 FR 7928, February 12, 2003) that EPA would support "state developed" programs for certification. The previous permit governing CAFOs (AZG800000) requires certified planners to prepare and approve the NMPs. In addition, the NRCS has a certification program as mentioned in the NRCS Nutrient Management Standard (Code 590), therefore the Department will utilize the NRCS process that is already in place. The Department believes that only the persons who pass the "certified nutrient management planning specialists" program are "qualified persons" for the purposes of preparing an NMP under the AZPDES CAFO general permit. To ensure that its NMP is developed and approved by a certified nutrient management planning specialist and by the applicable timeframe specified in the permit, a permittee may need to utilize a certified nutrient management planning specialist that is outside of the NRCS and the Arizona Department of Agriculture.

Comment: Part IV.A.: The permit requires that the permittee implement an NMP that is prepared and approved by a certified nutrient management planning specialist. Because current NRCS policy is for persons to "self-certify," revise the definition of "certified nutrient management planning specialist" to: "a person who certifies that he/she meets NRCS certification criteria for development of nutrient management plans."

Response: The permit includes the following definition: "'Certified nutrient management planning specialist' means a person who has successfully completed all the Arizona Natural Resource Conservation Service (Arizona NRCS) courses and coursework of the Arizona NRCS Certified Nutrient Management Planning Specialist certification process." The Department prefers the current wording because the Department chooses to limit the categories of NRCS certifications that are qualified to prepare NMPs under this CAFO General Permit. No change made to the permit.

Comment: Part IV.A.1.: States that new sources must develop an NMP before submitting an NOI; this is impossible according to the deadline found in Table 2 on Page 8. First, March 3, 2004 is all ready past. Secondly, no operation can submit an NOI until the Permit is final, and thirdly, it will be extremely difficult for new sources to obtain an NMP prior to the NOI submission deadline considering the lack of planners available. If enforced, this could prevent operations from starting their business.

Response: The Department understands that the proposed application due date in the CAFO general permit for NOI submission for certain new sources is passed. The federal regulations require that new CAFOs submit a permit application at least 180 days before operations commence and that the NMP must be prepared at the time the application is submitted. The Department may not change those requirements.

As mentioned in a previous response to comment, the Department revised the language in Table 2 to state that for new CAFOs the application is due 180 days before the CAFO begins operation. In some cases, the applicant will need to apply for permit coverage as soon as the CAFO general permit is issued. Because all new CAFOs must prepare and implement an NMP at the time the NOI is submitted to the Department according to state rule and federal regulation, the Department may not specify additional time in the permit for new CAFOs. Although the general permit was not available, the federal rule has been in effect since April 13, 2003 and the state rule was available since December 2, 2003 (effective February 2, 2004).

Comment: Part IV.A.1.c.: Provide a map or list unique waters.

Response: The definition of "Unique waters" in Part X of the permit states: "'Unique water' means a water listed in A.A.C. R18-11-112." A specific list of the "unique waters" is included in A.A.C. R18-11-112(E). As of December 31, 2003, that list is:

1. The West Fork of the Little Colorado River, above Government Springs;
2. Oak Creek, including the West Fork of Oak Creek;
3. Peoples Canyon Creek, tributary to the Santa Maria River;
4. Burro Creek, above its confluence with Boulder Creek;
5. Francis Creek, in Mohave and Yavapai counties;
6. Bonita Creek, tributary to the upper Gila River;
7. Cienega Creek, from confluence with Gardner Canyon and Spring Water Canyon at R18E T17S to USGS gauging station at 32°02'09" / 110°40'34", in Pima County;
8. Aravaipa Creek, from its confluence with Stowe Gulch to the downstream boundary of Aravaipa Canyon Wilderness Area;
9. Cave Creek and the South Fork of Cave Creek (Chircahua Mountains), from the headwaters to the Coronado National Forest boundary;
10. Buehman Canyon Creek, from its headwaters (Lat. 32°24'55.5" N, Long. 110°39'43.5"W) to approximately 9.8 miles downstream (Lat. 32°24'31.5" N, Long. 10°32'08" W);
11. Lee Valley Creek, from its headwaters to Lee Valley Reservoir;
12. Bear Wallow Creek, from its headwaters to the boundary of the San Carlos Indian Reservation;
13. North Fork of Bear Wallow Creek, from its headwaters to Bear Wallow Creek;
14. South Fork of Bear Wallow Creek, from its headwaters to Bear Wallow Creek;
15. Snake Creek, from its headwaters to its confluence with Black River;
17. Hay Creek, from its headwaters to its confluence with the West Fork of the Black River;
18. Stinky Creek, from the Fort Apache Indian Reservation boundary to its confluence with the West Fork of the Black River; and
19. KP Creek, from its headwaters to its confluence with the Blue River.

Because the list is in Arizona Administrative Code, the Department will not list the unique waters in the permit, but will list the unique waters in the Fact Sheet.

Comment: Part IV.A.2.d. and Part IV.B.4.: What about regular dairy wash chemicals?

Response: Part IV.A.2.d. requires that the NMP contain provisions that "ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or stormwater storage or treatment system unless specifically designed to treat such chemicals and other contaminants." Before a permittee uses a product with chemicals such as a dip at dairies, the permittee must ensure that the treatment system used on the CAFO is designed to handle the particular chemical(s). If the treatment system is not designed to treat the chemical(s), the permittee must exclude the product from the wastewater and manure that is transferred to the treatment system, which in some cases means eliminating it from use. No change made to the permit.

Comment: Part IV.D.2.: States that each inspection requires a report or log. Although this is federally mandated, it is an unrealistic demand.

Response: The Department must comply with the federal requirements to maintain inspection reports or logs. 40 CFR 122.42(e)(2) requires a permittee to create and maintain applicable records identified in 40 CFR 122.42(e)(1). The Department believes that the use of a "log sheet" in some cases is appropriate and will significantly reduce the burden for these inspections while providing the necessary information. The Department will be developing sample checklists or log sheets for permittees to use. No change made to the permit.

Comment: Part IV.D.2.c.: "Weather information" too broad; should be changed to include only rain event descriptions.

Response: "Weather information" should include information on the number, severity and date of precipitation events. If there was no precipitation since the last inspection, then the report would be "no precipitation events during the period." The Department revised Part IV.D.2.c. of the permit to refer to precipitation events instead of weather information.

Comment: Part IV.D.4.: Seven days may not be long enough to complete NMP revisions; need to increase timeframe. Does a certified NMP Planner have to make the changes (if yes, keep this in mind when adjusting timeframe). Currently at ADA, there is one NMP planner currently working on forty CAFOs throughout the State. It is unreasonable for this planner to have to make immediate/urgent changes for CAFOs with developed NMPs, while others waiting for new NMPs get further delayed. Although we are currently unable to suggest an alternate timeframe, we would appreciate an opportunity for discussion between stakeholders and others to arrive at a more reasonable timeframe requirement.

Response: The intent was for the permittee to make corrections to the BMP or problem identified in the inspections within seven days. When the NMP must be modified because the BMP must be modified or a new one added, the Department will expect that those changes be made and the NMP modified as soon as possible. The Department revised Part IV.D.4. of the permit as follows:

4. Follow-Up Actions. Based on the results of the daily or weekly inspections, the permittee shall correct any problems identified by the inspections, and modify the NMP to include additional or modified BMPs designed to correct problems identified. The permittee shall complete ~~revisions to the NMP~~ corrections to the identified problems within seven calendar days following the inspection. If existing BMPs need to be modified or if additional BMPs are necessary, ~~the modified BMPs shall be~~ the permittee shall modify the NMP and implement the new or modified BMP as soon as practicable.

The Department also made conforming changes to Part VII.D. of the Fact Sheet.

Comment: Part IV.E.3.: States the NMP must be provided for public review. What information is shared; is confidential information excluded; are NMPs protected by FOIA?

Response: Any documents submitted to or maintained to comply with permitting requirements are "public information" and if requested, the permittee must provide that document for review by any member of the public. If the permittee believes that part of the NMP should be held confidential pursuant to A.R.S. 49-205(A)(2), the permittee should make that demonstration/request at the time that the document is developed to comply with a permitting requirement or submitted to the Department. No change made to the permit.

Comment: Part IV.F.: Fifteen days may not be long enough to make changes. Does a certified NMP Planner have to make the changes (if yes, keep this in mind when adjusting timeframe). Currently at ADA, there is one NMP planner currently working on forty CAFOs throughout the State. It is unreasonable for this planner to have to make immediate/urgent changes for CAFOs with developed NMPs, while others waiting for new NMPs get further delayed. Although we are currently unable to suggest an alternate timeframe, we would appreciate an opportunity for discussion between stakeholders and others to arrive at a more reasonable timeframe requirement.

Response: The current draft language included the ability for the Department to specify an alternate timeframe for modifying the NMP. The Department agrees that 15 days is too short a time period when the NMP must be modified. A certified nutrient management planning specialist must make the changes to the NMP if the deficiencies require modifying a BMP or adding additional BMPs or structural practices to accommodate BMP changes. The Department revised Part IV.F.of the general permit as follows:

"F. Deficiencies in the NMP. The Department may notify the permittee at any time that the NMP does not meet one or more of the requirements of this permit. The notification must identify the provisions of this permit that are not being met and parts of the NMP that require modification. ~~Within 15 business days of receipt of the notification from the~~ The Department shall specify the compliance timeframes within the notification. ~~(or as otherwise provided by the Department), the~~ The permittee must make the required changes to the NMP and submit to the Department a written certification that the requested changes have been made. The Department may request submittal of the revised NMP to confirm all deficiencies have been adequately addressed. The Department may also take appropriate enforcement action for the period of time the permittee was operating under a plan that did not meet the minimum requirements of this permit.

NOTE: A certified nutrient management planning specialist must make the changes to the NMP if the deficiencies require modifying a BMP or adding additional BMPs or structural practices to accommodate BMP changes."

The Department also made conforming changes to Part VII.F. of the Fact Sheet.

Comment: Part V.B.3.: Replace "as soon as possible" with "as soon as conditions are safe."

Response: The Department replaced "as soon as possible" with "as soon as conditions allow" in Part V.B.3. Part V.B.4. addresses what the permittee should do if the conditions are not safe.

Comment: Part VI.D.: First paragraph refers to an annual report. Will submission of a current NMP suffice, or is this a separate report?

Response: The Department believes that submission of a current NMP may contain more information than that required in Part VI.D. of the permit. The permittee may provide a current

NMP as its annual report if it meets the requirements of Part VI.D. of the permit.

Comment: Part VI.D.2.: Replace "permittee" with "animal feeding operation."
Response: The Department agrees and made the change.

Comment: Part VII.A.: What happens when the animal feeding operation is sold, or ownership is transferred? Must a closure plan be submitted? If yes, must a new NMP be developed, even if the operation does not change with exception to the owner?
Response: The transfer of ownership is addressed in Part VIII.L.3. of the permit. The seller must submit a Notice of Termination within 30 days of the sale of the CAFO. The buyer must submit a Notice of Intent within 30 days of the purchase of the CAFO. If the only change is the ownership, then the NMP may only need updates to the contact information and certification pages. In any case, the new owner must develop and implement a new or updated NMP for the operation that matches the new circumstances.

A closure plan is only required when all or part of an operation ceases or an operation no longer meets the definition of a CAFO. In those situations, the CAFO must also address the closure requirements in Part VII of the permit. No change made to the permit.

Comment: PartVIII.L.6.: "Permittee shall report all instances of noncompliance not otherwise required to be reported under this section, at the time monitoring reports are submitted. The reports shall contain information listed in paragraph 5 of this section." This section is confusing, contradictory and is expressed in a fashion that requires the permittee to give up their Fifth Amendment rights dealing with incrimination. What are the otherwise required noncompliance instances? This section needs to clarify such required reporting.
Response: The language in Part VIII.L.6. is based on 40 CFR 122.41(l)(7) which states:
"(7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (l) (4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (l)(6) of this section."
The "other noncompliance" instances may be if the owner or operator did not comply with the permit and the non-compliance was not "a planned change" (Part VIII.L.1); "an anticipated non-compliance" (Part VIII.L.2), or "non-compliance that may endanger human health or the environment (Part VIII.L.4.a.). EPA requires this language to be in every permit. No change made to the permit.

Comment: Part VIII.P.: No condition of this general permit releases the permittee from any responsibility or requirements under other environmental statutes or regulations. For example, this permit does not authorize the "take" of endangered or threatened species as prohibited by section 9 of the Endangered Species Act, 16 U.S.C. 1538. Information regarding the location of endangered or threatened species and guidance on what activities constitute a "take" are available from the U.S. Fish and Wildlife Service at www.fws.org. The commenter understands that this permit does not provide for a "take" permit under the Endangered Species Act. However, this section will be confusing to permittees when they attempt to understand the relationship between the AZPDES Permit and the Endangered Species Act. Our understanding is that neither the Clean Water Act (CWA) nor the CWA Non-Point Discharge Elimination (NPDES) have jurisdiction for protection of species or critical habitat designations under the ESA. If the ADEQ is going to implement these categories we would like to know what "due process" rights a permittee is afforded under the general permit program.
Response: The purpose of this provision is to state that no matter what the permit allows the owner or operator to do as part of the CAFO operations, authorization to operate under the

CAFO general permit DOES NOT allow the owner or operator to violate any responsibilities or requirements for other environmental acts, including the Endangered Species Act. The permit does not impose any more restrictions or requirements, rather those other environmental acts, in and of themselves, impose the requirements on owner or the operator of the CAFO. The owner or operator is responsible to make sure that all actions comply with the requirements of those other laws.

Comment: Part X. Definition of "certified nutrient management planning specialist": "Resource" should be "Resources".

Response: The Department made the change.

Notice of Intent (NOI)

Comment: Part I and II: Replace "status" with "land status." Should address multiple land areas, consider including instructions to "Check all that apply."

Response: The Department intended to obtain information on whether an owner and operator was a federal, state, private, public or tribal entity. The Department agrees that it would be good to add a statement about whether any part of the CAFO is on Indian Country. The Department has modified the language on page 2 of the NOI.

Comment: Part III. CAFO. Provide animal weight in table because swine category is based on quantity and weight. Capacities may not be accurate on older facilities, especially.

Response: The Department modified Part III of the NOI and Part V of the NOT to state: "(breakdown swine count by number < 55 lbs and number = 55 lbs)."

Notice of Termination (NOT)

Comment: If sold, must the new owner submit an NOI?

Response: Yes. Part VIII.L.3 of the general permit requires that the buyer (new owner) to submit an NOI to the Department. The Department added a reminder to Part II of the NOT.